404 Jurisdiction Screening Guide

(Draft) November 12, 2020

A Background

1) Purpose: Provide a suggested chronology to screen whether the application (for an authorization under Section 404 of the Clean Water Act) for a proposed project will be reviewed by the Corps (retained) or by FDEP (assumed).

2) Limitation: The GIS datasets are not precise and therefore can only assist the initial and necessarily rapid screening of an application/request. The final determination can only be made by comparing actual observations of the site to the text of the MOA (next paragraph).

3) MOA: Following are relevant extracts from the Memorandum Of Agreement Between The Florida Department Of Environmental Protection And The United States Army Corps Of Engineers.

   a) Retained Waters (paragraph II.A.): "The Corps will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (Attachment A), as well as all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the Retained Waters List, including wetlands adjacent thereto landward to the administrative boundary. For purposes of this Agreement, the administrative boundary demarcating the adjacent wetlands over which jurisdiction is retained by the Corps is a 300-foot guide line established from the ordinary high water mark or mean high tide line of the retained water. In the case of a project that involves discharges of dredged or fill material both waterward and landward of the 300-foot guide line, the Corps will retain jurisdiction to the landward boundary of the project for the purposes of that project only."

   b) Indian Country (paragraph II.B.): "The Corps shall retain responsibility for permitting the discharge of dredged and fill material in waters of the United States within "Indian country," as that term is defined at 18 U.S.C. § 1151. Title 18 U.S.C. §1151 defines "Indian country" as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Indian reservations include lands held in trust by the United States for an Indian tribe even if such lands have not been formally designated as an Indian reservation."

   c) Screening (paragraph III.A.): "When an application or verification request is received by either party, the application will be screened using the Retained Waters List and GIS layers to determine if the proposed activity will occur within Corps retained waters, as identified in Section II, above. When a proposed activity falls within retained waters, DEP will, within five calendar days of receipt, refer the applicant to

the Corps. Likewise, when a proposed activity falls within State assumed waters, the Corps will, within five calendar days of receipt, refer the applicant to DEP."

4) Footprint of fill versus project boundary: Whether or not the application is retained by the Corps depends on the footprint of the proposed fill (discharge of dredged and fill material). If any portion of the footprint of the fill is located within 300 feet of the shoreline of a retained water (the 300 foot guideline), then the application for the entire project will be reviewed by the Corps (retained), i.e., whether to authorize the fill for that project both waterward and landward of the 300 foot guideline. See also Section D (Administrative Boundary).

B Screening layers.

1) The following layers with a 300-ft buffer added compose "Screening Level 1":

   a) Retained Waters List. This depicts the waters that are named on the MOA's Retained Waters List. This layer is based on selecting polygons and lines from the USGS National Hydrographic Dataset.

   b) NOAA Composite Shoreline. This layer is digitized from NOAA's historic surveys of shorelines at MHW (T-sheets). Retained waters also include "all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the Retained Waters List".

2) The following layers with a 300-ft buffer added compose "Screening Level 2":

   a) FWC Florida Shoreline. This shoreline depicts the shoreline of tidal and other major waters digitized from aerials at a later date (primarily 2004) than the "Level 1" layers so could show accretion, additions, or construction (bulkheads, canals).

   b) NOAA MHHW Inundation (Sea Level Rise 0 foot). This layer is a recent GIS analysis of areas that would be inundated at MHHW. The actual MHW may extend into this light orange area because of change in tidal datum or because of changes in the shorelines/currents after the NOAA Composite survey date.

3) The "Indian Country" layer is the Land Areas of Federally Recognized Tribes (LAR) map provided by the Bureau of Indian Affairs (BIA).

C Screening steps.

1) Does the proposed fill intersect or nearly intersect areas labeled "Indian Country"? Then the application is very likely retained by the Corps because fill is located within Indian Country as that term is defined in the MOA. The final determination subject to confirmation of the status (e.g., is it held in Trust by the U.S.) & legal description of boundaries.

2) Consolidated Retained Waters Guideline layer

   a) Does the proposed fill intersect or nearly intersect areas labeled "Screening Level 1" or "Screening Level 1 and 2"? If yes, the application is very likely retained. Go to Step 3.

   b) Does the proposed fill intersect or nearly intersect areas labeled "Screening Level 2"? If yes, the application is possibly retained. Go to Step 4.

3) Examine the "Level 1" layers and then go to Step 5. "Screening Level 1" or "Screening Level 1 and 2" depicts a 300 feet buffer of the most landward of the shorelines of these "Level 1" layers.

4) Examine the "Level 2" layers and then go to Step 5. "Screening Level 2" or "Screening Level 1 and 2" depicts a 300 feet buffer of the most landward of the shorelines of these "Level 2" layers.

5) Compare the mapped shoreline to the actual shoreline The actual location of the 300 foot guideline must and shall be measured from the actual presence & location of the MHW (for tidal waters) or OHW (for non-tidal portions of the Retained Waters List) based on application drawings, site observations, or professional surveys.

   a) Note the actual shoreline may have been filled, altered, or eroded after the date of the GIS layers.

   b) Note the GIS shorelines are sometimes "apparent shorelines", i.e., along the waterward edge of vegetation when the vegetation obscures the actual shoreline.

   c) Note the "Level 2" layers may extend further upstream of actual extent of tide, e.g., past control structures, in which case they would not be retained (unless on Retained Waters List).

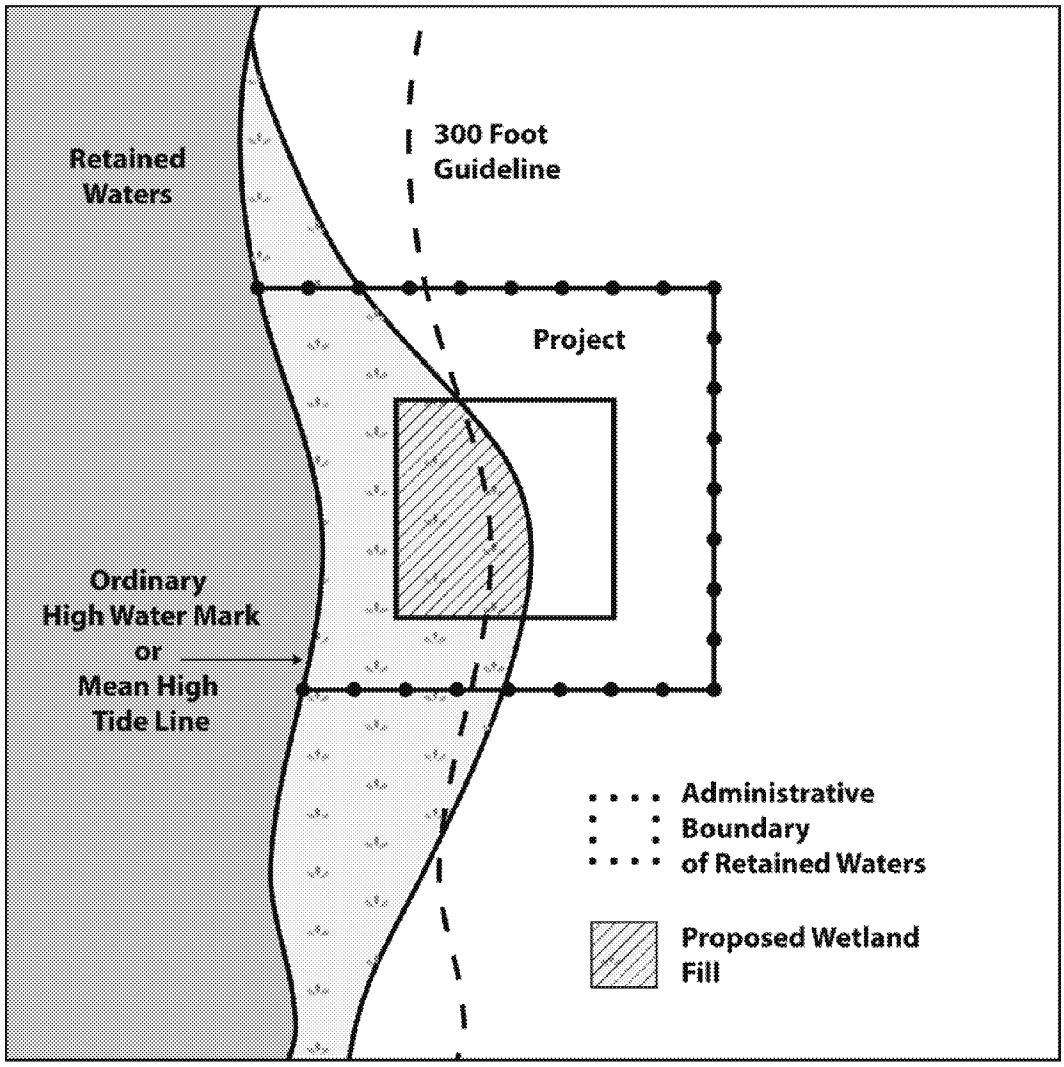
D Administrative Boundary.

The following text and figures are copied from Section 4.1 of the Draft State 404 Program Applicant's Handbook.

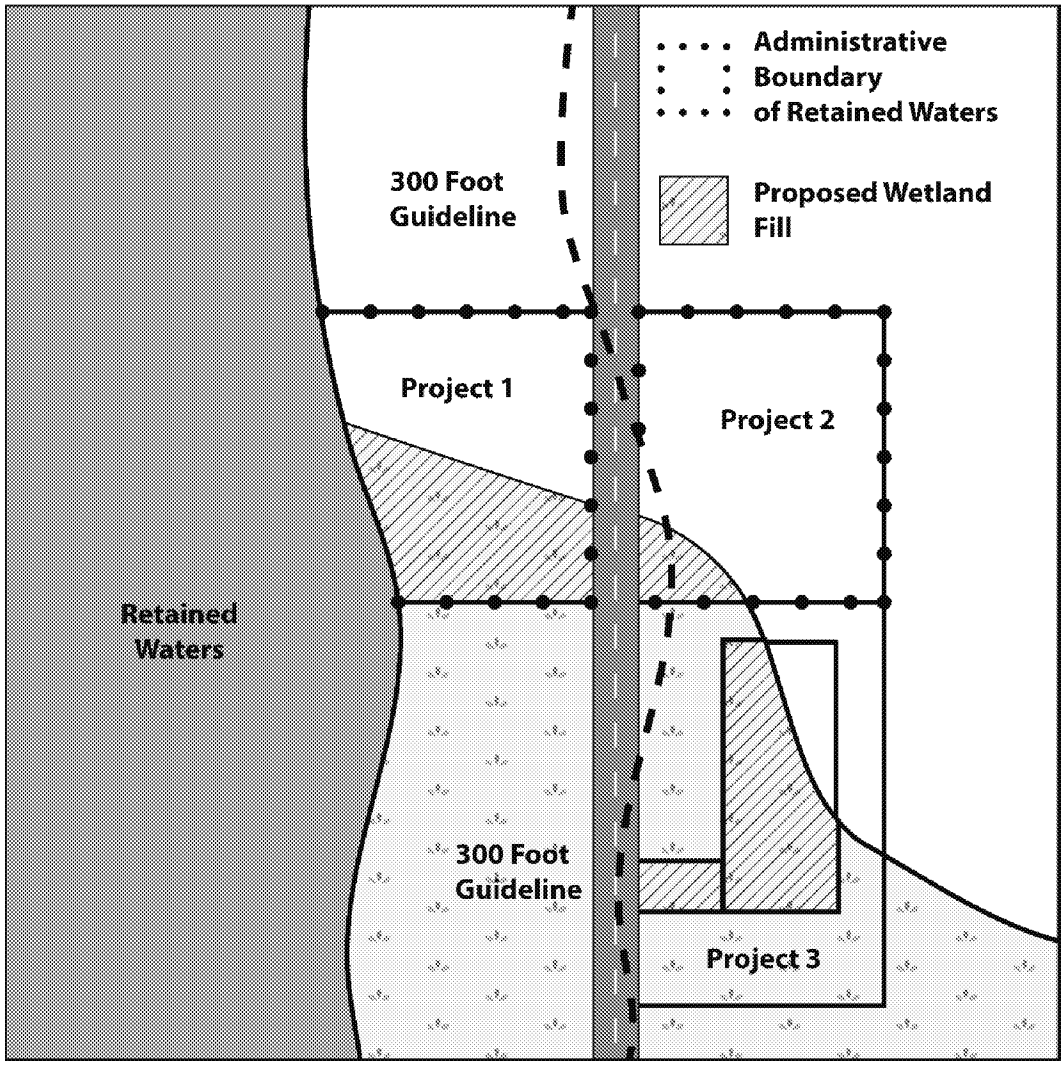
(begin extract)

The following illustrations demonstrate how to determine the administrative boundary of retained waters:

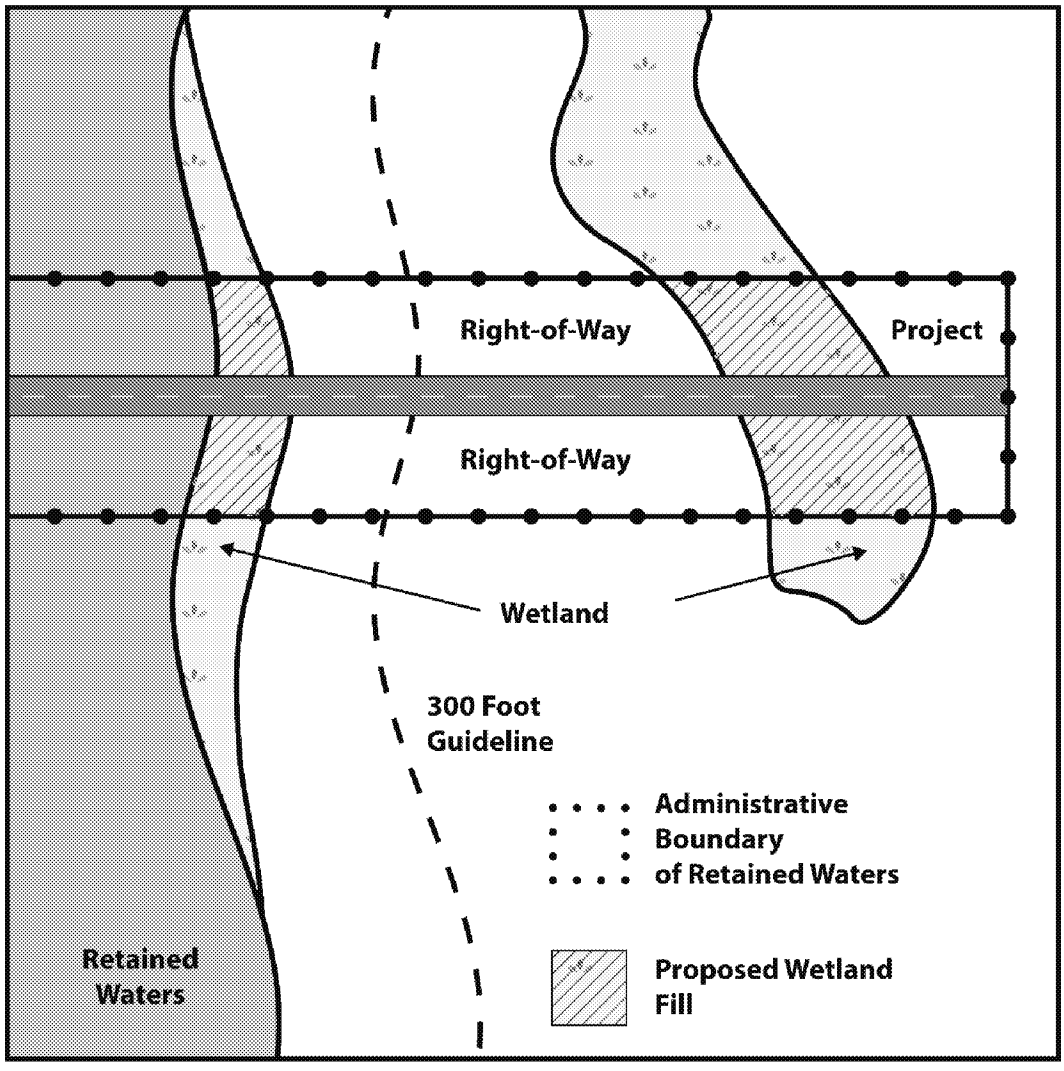
Example 1: Project with dredge and fill activity both waterward and landward of the 300-foot guide line. The 404 permit application would be processed by the Corps.



Example 2: Projects with dredge and fill activity and project boundaries waterward and/or landward of the 300-foot guide line. Projects 1 and 2 are retained and the 404 application will be processed by the Corps. Project 3 does not include any dredge or fill activities waterward of the 300 foot guide line, and therefore is not retained by the Corps, and the 404 application will be processed by the state Agency.



Example 3: A linear project including dredge and fill activities waterward of the 300 foot guide line. Linear projects may sometimes be miles long, but if there are dredge or fill activities waterward of the 300-foot guide line within the project boundary, the project is within retained waters, and the 404 application will be processed by the Corps.



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E Points of Contact for this Guide

For questions, suggestions and comments.

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